IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 1, 2002 at Jackson

STATE OF TENNESSEE v. ALICIA THARPE

Direct Appeal from the Circuit Court for Williamson County
No. I-601-177 Donald P. Harris, Judge

No. M2002-00992-CCA-MR3-CD - Filed April 4, 2003

Alicia Tharpe appeals her sentence of split confinement imposed upon her guilty plea to theft over $1000. She seeks a fully probated sentence and challenges the imposition of day-for-day county jail confinement. We affirm the trial court's denial of full probation but reverse the day-for-day period of confinement and remand for modification of the judgment to reflect that the defendant is eligible for good conduct or work credits pursuant to Tennessee Code Annotated section 41-2-111(b).

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed in part, Reversed in part, and Remanded for modification of the judgment.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and ALAN E. GLENN, JJ., joined.

John H. Henderson, District Public Defender; and Gene Honea Assistant District Public Defender, for the Appellant, Alicia Tharpe.

Paul G. Summers, Attorney General & Reporter; Renee W. Turner, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Lee E. Dryer, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

On October 31, 2001, Alicia Tharpe appeared before the Williamson County Circuit Court and entered a guilty plea to one count of Class D felony theft over $1,000. *See* Tenn. Code Ann. §§ 39-14-103, -105 (1997). Pursuant to a plea agreement, the state recommended a two-year sentence as a Range I offender. The method of service of the sentence was to be determined by the trial court after a sentencing hearing. The defendant agreed to pay a $500 fine to the economic crime fund; no restitution was sought inasmuch as the stolen property had been recovered.

The facts undergirding the plea are straightforward. On December 13, 2000, the defendant was performing housekeeping services at the residence of Joan Gehrig in Brentwood. The

defendant stole one piece of Ms. Gehrig's jewelry, a sapphire and diamond ring, valued at approximately $6,000. The defendant pawned the item in Nashville for which she obtained $90. In her unsigned and undated written statement presented to the presentence investigator, the defendant claimed that she did not actually take the ring from Ms. Gehrig's residence but, rather, found it on the ground near the van that she had been driving. The defendant admitted exercising control over the property and pawning it.

A sentencing hearing was scheduled for February 22, 2002. As of that date, the defendant had not paid the $100 administrative fee that had been assessed when counsel was appointed to represent her, but the trial court declined to postpone sentencing. The state introduced a copy of the presentence investigation report and rested. The defendant, likewise, relied on the presentence report and offered no additional proof. The presentence report reflects that the defendant has four previous convictions for Class A misdemeanor theft, one criminal impersonation conviction, and two convictions for driving with a revoked license. Evidently, the defendant received probationary sentences for these offenses. The defendant had violated the probationary sentence imposed for the most recent theft conviction, for which her probation was extended six months, and she was ordered to perform public service. In addition, the defendant had a charge of misdemeanor theft pending in the Davidson County general sessions court.

The defendant argued at the hearing that the offense did not involve a robbery or violence and that she was presumed to be a favorable candidate for probation. She offered that she was supporting several relatives, including her mother, grandmother, and brother, and she was fearful that an incarcerative sentence would jeopardize her present employment.

In reviewing the presentence report, the trial court was openly concerned that the defendant had not accepted responsibility for her actions. The trial court noted that the defendant took the position with the presentence investigator that the ring appeared to be old and that she did not know to whom it might belong. Considering the value of the diamond and sapphire ring, the trial court found it inconceivable that the defendant did not appreciate its worth. By the same token, the defendant had failed to pay the $100 administrative assessment, further indicating her refusal to take responsibility.

Although finding that the defendant was presumed to be a favorable candidate for alternative sentencing, the trial court reviewed the defendant's track record with the criminal justice system and concluded that the defendant's behavior showed a pattern of conduct that heretofore had not been deterred. For that reason, the trial court stated that the form of alternative sentencing best suited to the defendant was split confinement. The trial court suspended the agreed upon two year sentence and placed the defendant on supervised probation with the conditions that she pay her fine and costs and that she serve 180 days, day for day, in the Williamson County jail.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review of the record with a presumption that the determinations made by the trial court are correct. *See* Tenn. Code Ann. § 40-35-401(d) (1997).

This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). Likewise, the trial court has an affirmative duty to state on the record, either orally or in writing, which enhancement and mitigating factors it found and its findings of fact. Tenn. Code Ann. §§ 40-35-209(c), -210(f) (Supp. 2002); *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998); *State v. Russell*, 10 S.W.3d 270, 278 (Tenn. Crim. App. 1999).

"The burden of showing that the sentence is improper is upon the appellant." *Ashby*, 823 S.W.2d at 169. If appellate review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b) -103(5)(1997) and (Supp. 2002); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

On appeal, the defendant presses the argument that in light of her favorable candidacy for probation, the trial court should have ordered that her sentence be fully suspended. The defendant has also submitted supplemental authority to make a claim that the confinement portion of her sentence is illegal. We affirm the trial court's rejection of a fully suspended sentence for the defendant but reverse that part of the sentence requiring day-for-day service.

The law is settled that a trial court cannot deny a defendant the statutory right to earn good conduct credits or authorized work credits if the defendant receives a sentence of split confinement and becomes a county jail inmate. *See* Tenn. Code Ann. § 41-2-111(a) (b) (1997); *State v. Jeannie Hudson*, No. E2001-00377-CCA-R3-CD, slip op. at 4-5 (Tenn. Crim. App., Knoxville, Feb. 19, 2002), *perm. app. denied* (Tenn. 2002); *State v. Jared M. Barnes*, No. E2001-00325-CCA-R3-CD, slip op. at 10 (Tenn. Crim. App., Knoxville, Dec. 10, 2001); *State v. James Kevin Underwood*, No. E2000-01945-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Aug. 2, 2001).

Regarding the defendant's bid for a fully suspended sentence, she misapprehends her burden of demonstrating suitability to receive that sentencing largesse. Entitlement to full probation involves a separate inquiry from that of determining if a defendant is entitled to an alternative sentence. *See State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000). Unlike the presumption of favorable

candidacy for alternative sentencing in general, *see* Tenn. Code Ann. § 40-35-102(6) (1997), a defendant bears the burden of demonstrating suitability for full probation, *see id.* § 40-35-303(b) (Supp. 2002); *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *Bingham*, 910 S.W.2d at 455-46. To carry that burden, the defendant must show that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000).

By imposing a split-confinement sentence, the trial court afforded the defendant the benefit of the presumption of favorable candidacy for alternative sentencing in general. The defendant, however, provided the trial court with no evidence or reasons upon which a fully probated sentence could rest. Our *de novo* review convinces us that the trial court correctly identified the defendant as an offender for whom some confinement is appropriate.

Accordingly, we affirm the trial court's determination that a split confinement sentence is appropriate. We reverse, however, that portion of the judgment ordering a 180 day-for-day county jail confinement period and order that the judgment be amended to reflect that the defendant is eligible to receive the applicable statutory conduct or work credits.

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JAMES CURWOOD WITT, JR., JUDGE